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IN THE

Supreme Court of the United States

October Term, 1972

No. 73-.....

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,

v.

ROBERT NEWMAN, M.D.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND SUGGESTION OF EXPEDITED CONSIDERATION

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND SUGGESTION OF EXPEDITED CONSIDERATION

The District Attorney of New York County, on behalf of the People of the State of New York, petitions for a writ of certiorari to review the judgment of the Court of Appeals of the State of New York in this case.

Opinions Below

The opinion of the Court of Appeals (App. A, *infra*, pp. 1a-15a) is not yet reported. The opinion of the Appellate Division, First Department, of the Supreme Court

of the State of New York (App. B, *infra*, pp. 16a-18a) is reported at 41 A.D.2d 807. The opinion of the Supreme Court, New York County (App. C, *infra*, pp. 19a-21a) is not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered on May 31, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

Question Presented

Whether federal statutes permit court-ordered disclosure of photographs of certain patients in a methadone clinic to an eyewitness to a homicide who recognized the killer as a fellow patient in the clinic, where the disclosure is solely to permit the apprehension of the killer whose identity cannot be learned by other means.

Statutes and Regulations Involved

This case involves 21 U.S.C. 872(c), 42 U.S.C. 242(a), 21 U.S.C. 1175(b)(2)(C), Section 130.40(g) of the Department of Health, Education and Welfare Regulations on Confidentiality of Methadone Patient Records (37 C.F.R. 26800) and Section 401.62 of the Special Action Office for Drug Abuse Prevention's Interpretive Regulation on Confidentiality of Drug Abuse Patient Records (37 C.F.R. 24638-9).

Statement of the Case

By a bare majority the New York Court of Appeals has ruled that, despite a 1972 Federal statute which expressly provides for judicially supervised disclosure of identity records of patients in methadone research and treatment clinics, two 1970 Federal statutory provisions provide an absolute bar to such disclosure. As a result of this decision, an investigation into the identity of a killer has been blocked, and a suspected murderer remains at large.

On June 7, 1972 Talmadge Berry was murdered in New York County in the presence of a witness who believed she recognized the killer as a fellow methadone patient in a clinic of the New York City Methadone Maintenance Treatment Program. When police efforts to identify Berry's assailant failed, the District Attorney of New York County issued a subpoena *duces tecum* to Dr. Robert Newman, Director of the Program, to produce photographs of certain patients fitting the killer's description, from the files of that clinic for the witness-patient to view. Dr. Newman moved to quash the subpoena, relying, in part, upon an immunity grant conferred upon him in a then proposed regulation issued by the Secretary of Health, Education and Welfare pursuant to 42 U.S.C. 242(a), which states in relevant part:

> "The Secretary [of Health, Education and Welfare] may authorize persons engaged in research on the use and effect of drugs to protect the privacy of individuals who are the subject of such research by withholding from all persons not connected with the conduct of such research the names or other identify-

> ing characteristics of such individuals. Persons so authorized to protect the privacy of such individuals may not be compelled in any Federal, State or local civil, criminal, administrative, legislative or other proceedings to identify such individuals."

His claim of immunity was rejected on the ground that the regulation was not yet effective and, upon his refusal to obey the court's order to comply with the subpoena, Dr. Newman was held in contempt and sentenced to thirty days in jail (App. C, *infra,* pp. 19a-21a; see N.Y. Judiciary Law §750).* Shortly thereafter, the regulation relied upon by Dr. Newman for immunity was made effective (App. D, *infra,* pp. 24a-25a).

On appeal to the Appellate Division Dr. Newman asserted that the court-ordered compliance with the subpoena was void in view of 42 U.S.C. 242(a) and the Secretary's regulation. Petitioner relied upon the procedure provided for disclosing drug patients' records in the newly-enacted 21 U.S.C. 1175 (b)(2)(C), which states in pertinent part:

> *"Confidentiality of Patient Records-Disclosure Authorization.*
>
> "(a) Records of the identity * * * of any patient which are maintained in connection with the performance of any drug prevention function** authorized or assisted under any provision of this Act or any Act amended by this Act shall be confidential and may be disclosed only for the purposes and under the circum-

* Dr. Newman was granted a stay in execution of the sentence and was never incarcerated pursuant to his conviction for contempt.

** "Drug prevention function" is defined in Section 1103(b), which states, "The term 'drug prevention function' means any program or activity relating to drug abuse, education, training, treatment, rehabilitation, or research, and includes any such function even when performed by an organization whose primary mission is in the field of drug traffic prevention functions, or is unrelated to drugs."

stances expressly authorized under subsection (b) of this section.

"Purpose and circumstances of disclosure affecting consenting or non-consenting patient

"(b) (1) [consenting patients] * * *

(2) If the patient, with respect to whom any given record referred to in subsection (a) of this section is maintained, does not give his written consent, the content of such record may be disclosed as follows * * * (C) * * * If authorized by an appropriate order of a court of competent jurisdiction granted after application showing good cause therefore. In assessing good cause the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services. Upon granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure.

"Prohibition against use of record in making criminal charges or investigation of patient

"(c) Except as authorized by a court order granted under subsection (b)(2)(C) of this section, no record referred to in subsection (a) of this section may be used to initiate charges against a patient or to conduct any investigation of a patient." 21 U.S.C. §1175.

Petitioner argued that Section 1175 repealed 42 U.S.C. 242 (a) by implication and that, since 1175(b)(2)(C) had been complied with, Dr. Newman had no immunity and was required to produce the photographs. The Appellate Divi-

sion unanimously agreed with petitioner, but modified the subpoena, in order to guard against any unnecessary disclosure, by adding to it the following requirements:

> "that the witness view the photos under supervision of defendant Commissioner or someone designated by him, and that none of the pictures may be exhibited to police or prosecutor except that one which she may identify as the person sought." (App. B, *infra*, pp. 17a-18a)

That court also offered Dr. Newman an opportunity to purge himself of contempt by complying with the amended subpoena. *Ibid.*

Several days after the Appellate Division decision, the United States Attorney General issued another, independent grant of immunity to Dr. Newman (App. A, *infra*, p. 6a, n. 5) pursuant to 21 U.S.C. 872(c), which states in relevant part:

> "*Education and research programs of the Attorney General—Authorization*
>
> "(a) The Attorney General is authorized to carry out educational and research programs directly related to enforcement of the laws under his jurisdiction concerning drugs * * * Such programs may include—
>
> * * *
>
> "(3) studies or special projects designed to assess and detect accurately the presence in the human body of drugs or other substances which are or may be subject to control under this title, including the development of rapid field identification methods which would enable agents to detect microquantities of such drugs or other substances:
>
> * * *

> "(c) The Attorney General may authorize persons engaged in research to withhold the names and other identifying characteristics of persons who are the subjects of such research. Persons who obtain this authorization may not be compelled in any Federal, State, or local civil, criminal, administrative, legislative, or other proceeding to identify the subjects of research for which such authorization was obtained."

Dr. Newman, ignoring the opportunity to purge himself, then appealed to the Court of Appeals to challenge the validity of the modified subpoena.

In that court, respondent claimed immunity based upon the Secretary's regulation, the Attorney General's grant and a regulation issued by the Special Action Office for Drug Abuse Prevention interpreting 21 U.S.C. 872(c), 42 U.S.C. 242(a) and 21 U.S.C. 1175(b)(2)(C) in a manner supportive of Dr. Newman's claim.* Petitioner, relying upon the plain meaning of 21 U.S.C. 1175(b)(2)(C) and its explicit legislative history, contended that the Special Action Office's interpretation of Section 1175 was erroneous, that 21 U.S.C. 872(c) and 42 U.S.C. 242(a) had been repealed by implication, and that the immunity granted pursuant to those provisions was a nullity. The Court of Appeals, by a vote of four to three, reversed the order of the Appellate Division and held that Congress, in enacting 21 U.S.C. 1175(b)(2)(C), had not repealed 21 U.S.C. 872 (c) or 42 U.S.C. 242(a), that Dr. Newman had immunity under Federal law, and that he could not be held in contempt for refusing to comply with the subpoena (App. A, *infra*, pp. 1a-15a). Specifically, the court reasoned that since the 1970 statutes, which authorized absolute confidentiality,

* The Special Action Office directs planning and policy for all Federal drug abuse prevention functions (21 U.S.C. 1131).

were solely addressed to "research" programs, the subject of this case, and the 1972 statute providing for disclosure was directed to "research" programs as well as "education[al]" and other types of drug programs, Congress in 1972 did not intend to reduce the absolute confidentiality provided for in 1970. In his dissenting opinion, Judge Charles D. Breitel wrote that the "plain language of the [1972] statute and the equally plain legislative history" show that Congress, in Section 1175, took the subject matter of the 1970 acts, expanded its substance, and gave both the old and expanded subject matter an entirely new treatment. In doing so, he concluded, Congress expressly, and wisely, left the disclosure or non-disclosure of records of methadone patients to the courts (App. A, *infra*, pp. 12a-15a).

Reasons for Granting the Writ

1. The issue presented by this case, which is one of first impression, is of fundamental importance regarding the extent of confidentiality of patients' records in all methadone research and treatment programs in this country. The plain meaning and legislative history of Section 1175(b)(2)(C) of the Drug Abuse Office and Treatment Act of 1972 manifest Congress's intent that the identification records of participants in "any program or activity relating to drug abuse, education, training, treatment, rehabilitation or research" [21 U.S.C. 1103(b)] be discoverable under carefully prescribed circumstances. Yet the Secretary of Health, Education and Welfare and the United States Attorney General, acting pursuant to authority delegated to them by Congress in 21 U.S.C. 872(c) and 42 U.S.C. 242(a) two years prior to the enactment of Section 1175 (b)(2)(C), have attempted to unilaterally grant drug "re-

search'' programs absolute immunity from this disclosure provision. In addition, the Special Action Office for Drug Abuse Prevention, noting that the outcome of this litigation ''could seriously affect treatment programs throughout the country'' (37 C.F.R. 24636), issued an interpretive regulation to all methadone research program directors advising them that their patients' names are absolutely confidential and are not subject to disclosure under Section 1175 (b)(2)(C). 37 C.F.R. 24638-9, §401.62. And while the court below, by a 4-3 vote disregarded ''the plain language of the statute [1175] and the equally plain supporting legislative history'' (Dissenting Opinion of Judge Charles D. Breitel, *infra* at pp. 12a-15a) and accepted the Special Action Office's interpretation, the issue presented here will be a troublesome, recurring one as each of the remaining States' highest courts, as well as the Federal courts, interpret Section 1175.

Unless this Court definitively construes Section 1175 the inconsistencies and disharmony within and among the States in the application of this provision of the Drug Abuse Office and Treatment Act of 1972, which ironically was intended by Congress to create the framework for a single, uniform approach to be followed by all drug research and treatment programs [117 Cong. Rec. 20201 (daily ed. Dec. 2, 1971) (Remarks of Senator Ribicoff); *id.* at 20207 (Remarks of Senator Hruska); *id.* at 20207 (Remarks of Senator Dominick); *id.* at 20246 (Remarks of Senator Chiles); 118 Cong. Rec. 680 (daily ed. Feb. 3, 1972) (Remarks of Representative Staggers); 21 U.S.C. 1102], will have two principal devastating consequences. First, the issue will continue to interfere with the effective administration of methadone research and treatment programs in every State, as the Special Action Office has noted:

> "* * * uncertainties as to the interpretation and application of section 408 [enacted as 1175] are creating difficulties and hardships for many such programs and their patients. On the one hand, treatment program counsellors are uncertain of the extent to which they can assure patients and prospective patients of the confidentiality of treatment records; on the other hand, efforts to promote occupational rehabilitation by working with actual or prospective employers, with the consent of the patients, are being frustrated in some instances by interpretations which have been placed on section 408 [1175]." 37 C.F.R. 24636.

Secondly, the issue will seriously undermine the ability of law enforcement officials throughout the United States to identify and prosecute criminals who are enrolled in methadone research and treatment programs. The judicially supervised disclosure provided by Section 1175 was designed by Congress to strike a balance between the need for drug programs to preserve the confidentiality of their patients' records in order to induce street addicts to enroll (37 C.F.R. 24636) and the equally compelling need to avoid an "unnecessary restriction on possible prosecutions" (117 Cong. Rec. 20206 (daily ed. Dec. 2, 1971) (Remarks of Senator Hruska); App. A, *infra,* pp. 14a-15a). But the administrative interpretations of Section 1175(b)(2)(C) promulgated by the Special Action Office, the Secretary of Health, Education and Welfare and the United States Attorney General, which are largely responsible for the majority view in the Court of Appeals (App. A, *infra,* pp. 6a-11a), may destroy that balance because they purport to vest the sole power to disclose confidential records in the staff of each methadone research and treatment program. As a result of the fundamental antagonism between this administrative interpretation and that dictated by Section 1175 and its legislative history, the courts of the various

States will be free to render their own inconsistent interpretations by which some prosecutors will be permitted access to patient records while others, such as petitioner, will be denied those records and be forced to helplessly acquiesce as a murder suspect goes free. Moreover, as Judge Breitel observed in his dissenting opinion below, the clear will of Congress has been frustrated by administrators in the executive branch of the Federal Government. Under these circumstances, and in view of the concern manifested by the Federal Government in its *amicus* brief submitted in the court below, review of such an important decision by this Court is appropriate.

2. As a result of the erroneous decision of the court below, a murderer is currently at large. Since the eyewitness to the homicide is available and waiting to participate in an identification proceeding, and since reliability of any such identification will diminish with the passage of time, petitioner believes it is in the interest of the People of the State of New York as well as that of public justice for this Court to expedite its consideration of this petition and render a determination prior to the end of the 1972 Term. Furthermore, if certiorari is granted, petitioner respectfully requests that this Court establish a briefing schedule that will permit the case to be heard at the October argument session.

Conclusion

It is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June, 1973

APPENDICES

Appendix A

Opinion of the Court of Appeals Entered May 31, 1973

STATE OF NEW YORK

COURT OF APPEALS

1 No. 68 73

THE PEOPLE &c.,

Respondent,

vs.

ROBERT NEWMAN, M.D.,

Appellant.

FULD, Ch.J.:

The principal question posed by this appeal—one of first impression—is whether the Director of the New York City Methadone Maintenance Treatment Program may validly refuse—when so authorized by the Attorney General of the United States and the Secretary of Health, Education and Welfare, pursuant to Federal legislation—to comply with a grand jury subpoena directing him to produce photographs of certain of his patients.

Talmadge Berry was shot and killed in Manhattan on June 7, 1972. A witness to the shooting told the police that she believed she had previously seen the killer in the waiting room of a methadone maintenance treatment clinic (known as Unit Number Two of the Francis Delafield Hospital Methadone Maintenance Treatment Program) where

she was also a patient. Some time later, based on this information, a subpoena was served on Dr. Robert Newman —the Director of the New York Methadone Maintenance Treatment Program—requiring him to produce photographs of Negro males between the ages of 21 and 35 who were patients at Unit Two of Delafield in 1972, prior to June 7.

A motion was subsequently made to quash the subpoena on the grounds that both Federal legislation and New York law—CPLR 4504, subdivision (a)—prohibited production of the photographs. That motion was denied and Dr. Newman was thereafter adjudged to be in contempt of court and sentenced to 30 days in jail. Although the Appellate Division recognized that the refusal of the appellant, Dr. Newman, to obey that subpoena was "[a]pparently motivated by the highest ethical canons of the medical profession in respect of confidential relations with a patient," it agreed with Special Term that Dr. Newman was guilty of contempt (40 A D 2d 633, 634; 40 A D 2d 672).[1]

In our court, as below, the appellant relies on both New York law (CPLR 4504, subd. [a]) and the Federal legislation enacted in 1970 (Comprehensive Drug Abuse Prevention and Control Act of 1970 [P.L. 91-513; 84 U.S. Stat. 1236]).

---

1. The Appellate Division modified Special Term's order by adding to the subpoena "appropriate safeguards against unnecessary disclosure": the witness to the homicide was to "view the photos under supervision of [Dr. Newman] or someone designated by him" and none of the pictures other than the one identified by the witness were to be exhibited to the police or prosecutor (40 A D 2d 633, 634).

Appendix A

Under State Law

Subdivision (a) of CPLR 4504, entitled "Confidential information privileged," provides that, "Unless the patient waives the privilege, a person authorized to practice medicine * * * shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity." Although it is doubtless true, as the appellant's affidavit recites, that the photos are "an absolutely indispensable component of the patient records" because they ensure proper identification of the patient and thus avoid administration of methadone to the wrong person, we do not regard them—to employ the words of the statute—as having been "acquired in attending a patient in a professional capacity." Rather, they were obtained by the appellant's staff during administrative admission procedures. Their true role, therefore, is not to enable the doctor to act in his "professional capacity" but to prevent unregistered patients from obtaining methadone and registered patients from obtaining the wrong dosage through administrative errors in identification. Serving solely such a medical management function, they may not be deemed privileged confidential information within the sense of the statute. This conclusion is supported by decisions holding that facts about a patient—which may be plainly observed or easily obtained by a layman—are not privileged. (See, e.g., *Klein* v. *Prudential Ins. Co.*, 221 N.Y. 449, 453; *Edington* v. *Aetna Life Ins. Co.*, 77 N.Y. 564, 571; *In re Albert Lindley Lee Memorial Hospital*, 115 F. Supp. 643, 646, affd. 209 F. 2d 122, cert. den. *sub nom. Cincotta* v. *U.S.*, 347 U.S.

960; see, also, 5 Weinstein-Korn-Miller, New York Civ. Prac., par. 4504.08.) Consequently, the appellant may not rely on New York's physician-patient privilege to justify nonproduction of the photographs.[2]

Under Federal Law

Dr. Newman, as already indicated, also urges that the Federal Comprehensive Drug Abuse Prevention and Control Act of 1970 (P.L. 91-513; 84 U.S. Stat. 1236)—hereafter referred to as the 1970 Act—and regulations issued under that Act prevent him from releasing the photographs. The District Attorney, on the other hand, contends that, pursuant to the Drug Abuse Office and Treatment Act of 1972 (P.L. 92-255; 86 U.S. Stat. 65)—hereafter referred to as the 1972 Act—the directors of methadone maintenance programs may be compelled to produce those records upon court order. Therefore, the issue posed upon this appeal is whether the 1972 Act repealed the 1970 Act insofar as the confidentiality of a patient's record is concerned.

Subdivision (a) of section 3 of the 1970 Act (U.S. Code, tit. 42, §242a, subd. [a]) and subdivision (c) of section 502 (U.S. Code, tit. 21, §872, subd. [c]) contain the controlling provisions. The first provided that the Secretary of the Department of Health, Education and Welfare was empowered to authorize persons "engaged in research on the use and effect of drugs" to "protect the privacy of the

2. In the view which we have taken on this aspect of the case, it is unnecessary to consider whether title VI of the recently enacted New York State Controlled Substances Act (Public Health Law, §3370 et seq.) would also preclude the photos from being "deemed confidential within the meaning of the civil practice law and rules" (Public Health Law, §3373).

research subjects" (i.e., the patients) by withholding their "names or other identifying characteristics" from anyone not connected with the research program. "Persons so authorized," the statute continued, "may not be compelled in any Federal, State, or local civil, criminal, administrative, legislative, or other proceedings" to identify the research subjects. The other provision—subdivision (c) of section 502—granted the same authority to the Attorney General. By March of 1972, however, neither the Secretary of HEW nor the Attorney General had exercised the authority thus given to such official.

Be that as it may, in that month, the 1972 Act—which, we note, was born of Congressional recognition that "[c]ontrol of drug abuse requires the development of a comprehensive, coordinated long-term Federal strategy" (U.S. Code, tit. 21, §1101, subd. [8])—was enacted. Instead of sanctioning a grant of absolute confidentiality, similar to that provided by the 1970 Act for drug research programs, the 1972 Act authorized disclosure upon court order of the records of patients in a wide variety of drug programs and activities, entitled "drug abuse prevention functions."[3] More specifically, subdivision (a) of section 408 (U.S. Code, tit. 21, §1175, subd. [a]) recited that "Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any drug abuse prevention function * * * shall be confidential," subject, however, to disclosure upon au-

3. Section 103 [*sic*], subdivision (b), of the 1972 Act (U.S. Code tit. 21, §1103, subd. [b]) defined "drug abuse prevention function" as "any program or activity relating to drug abuse education, training, treatment, rehabilitation, or research, and includes any such function even when performed by an organization whose primary mission is * * * unrelated to drugs."

thorization by "a court of competent jurisdiction" after "application showing good cause therefor."

After *the 1972 Act* had been enacted, the Secretary of HEW and the Attorney General each exercised his power under *the 1970 Act* to authorize persons "engaged in [drug] research" to withhold "the names and other identifying characteristics" of the research subjects, that is, the patients. Thus, the Secretary of HEW published regulations which provide—with respect to the methadone maintenance treatment programs such as that conducted by the appellant—that "information that would identify the patient will be kept confidential * * * and will not be divulged in any civil, criminal, administrative, legislative, or other proceedings conducted by Federal, State, or local authorities" (37 Federal Register 6943).[4] And the Attorney General, in a letter to Dr. Newman, dated November 8, 1972, also granted absolute confidentiality to patient records in his New York Methadone Maintenance Treatment Program.[5]

A little more than a week after the Attorney General had granted absolute confidentiality to Dr. Newman's

4. The regulation—entitled "Methadone: Proposed Special Requirements for Use"—was first published in the Federal Register on April 6, 1972—prior, we note, to the issuance of the subpoena in this case—and was promulgated by the Commissioner of Food and Drugs, pursuant to the authority vested in him by the Secretary of HEW (37 Federal Register 6940). It was published in final form on December 15, 1972, and became effective on that date (37 Federal Register 26790, 26800, 26806).

5. The letter read in this way: "I hereby authorize you to withhold the names and other identifying characters of persons who are the subjects of research conducted pursuant to and in conformity with this research project. You may not be compelled in any Federal, State, or local civil, criminal, administrative, legislative, or other proceeding to identify the subjects of such research."

methadone program, the Special Action Office for Drug Abuse Prevention—established by the 1972 Act "to provide overall planning and policy and establish objectives and priorities for all Federal drug abuse prevention functions" (U.S. Code, tit. 21, §1131, subd. [a])—prepared, "in consultation with the Department of Justice and the Department of Health, Education and Welfare," an "interpretative regulation" to "deal comprehensively" with section 408, the confidentiality provision of the 1972 Act (37 Federal Register 24636). "If society is to make significant progress in the struggle against drug abuse," the regulation read, the directors of "drug abuse treatment programs" must be able "to assure patients and prospective patients of anonymity."[6] The regulation also recited that the 1972 Act was not designed to repeal or amend the confidentiality provision of the 1970 Act (37 Federal Register 24639):

> "Nothing in either the language or the legislative history of the [1972] Act indicates any intent on the part of Congress to amend the [confidentiality] provisions of the 1970 Act or to reduce the protection which can be afforded under them. * * * the language of section 408 permits * * * a construction which harmonizes with the 1970 Act [and] clearly should not be construed to authorize a court order in derogation of any exercise of the authority of the Secretary of Health, Education, and Welfare * * * or the Attorney General."

6. The regulation further stated that "[t]he identification of a person as a patient of a general practitioner or a hospital clinic is not ordinarily of great significance, but the identification of a person as an enrollee in a narcotic treatment program can, in and of itself, have profoundly adverse consequences" (37 Federal Register 24636).

Appendix A

The interpretation of the Special Action Office—that the 1972 confidentiality provision neither "amend[ed] the [confidentiality] provisions of the 1970 Act" nor "reduce[d] the protection afforded under them" (37 Federal Register 24639)—is reasonable and persuasive. The authority in the 1970 Act to grant absolute confidentiality was designed to help ensure the success of drug research programs in which addict participants require anonymity (see, e.g., 1970 U.S. Code Cong. and Admin. News 4594-4595). A similar guarantee of anonymity was not, however, thought to be necessary in the 1972 Act because that statute covered a wide range of programs and activities ("drug abuse prevention functions") in which absolute confidentiality was not regarded as a prerequisite to successful operation of the programs.

For example, the success of a drug abuse education program, or of a job training program for medical aides—which are "drug abuse prevention functions" within the terms of the 1972 Act—does not depend upon the participants being assured of complete anonymity. Presumably, no one would refuse to participate in such programs—in contrast with a methadone maintenance program—because his picture might be exhibited to an eyewitness to a crime. The 1972 Act, therefore, permitted the records of program participants in "drug abuse prevention functions" to be disclosed "if authorized by an appropriate order of a court of competent jurisdiction" (U.S. Code, tit. 21, §1175, subd. [b][2][C]). That statute did not, however, affect the provision in the 1970 Act for absolute confidentiality in drug research programs.

It is of high significance that the other governmental agencies which, along with the Special Action Office, actual-

ly administer, coordinate and implement the 1970 and 1972 Acts have agreed with that agency's interpretation that the 1972 Act did not repeal or modify the absolute confidentiality provision of the 1970 Act. Not only did the Secretary of HEW—as well as the Attorney General—grant Dr. Newman's program absolute confidentiality under the 1970 Act *after* the 1972 Act had been enacted (37 Federal Register 6943; 37 Federal Register 26800) but the Department of Health, Education and Welfare—along with the Special Action Office—filed a Brief Amicus Curiae for the United States of America in support of the appellant's position.

Indeed, after noting that the Methadone Maintenance Treatment Programs are "the most important drug addiction research programs presently in existence" and that their "long range success * * * depends on the ability of each program director to promise to each participant, *unconditionally,* that his participation in the program will not be disclosed," the authors of the Government's brief went on to point out that "the United States Congress has enacted legislation over the last few years to encourage research into [the] causes and cures [of narcotic addiction]. In order to induce those suffering from drug addiction * * * to participate in these research programs, Congress enacted [in 1970] a statute granting *absolute* confidentiality to such participants, upon proper authorization. * * * [T]his federal statute is in full force and effect and is fully applicable to Methadone Maintenance Treatment Programs."

The construction thus given to the legislation by the very agencies charged with its administration, supervision

and enforcement is entitled to considerable weight. (See, e.g., *Matter of Howard* v. *Wyman*, 28 N Y 2d 434, 438; *Lewis* v. *Martin*, 397 U.S. 552, 559; *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381; *Zemel* v. *Rusk*, 381 U.S. 1, 11; cf. *Ferraiolo* v. *O'Dwyer*, 302 N.Y. 371, 376; *Grimmer* v. *Tenement House Department*, 204 N.Y. 370, rearg. den. 205 N.Y. 549, 550.) It is enough to recall, as we wrote in the *Howard* case (28 N Y 2d, at p. 438), that "[i]t is well settled that the construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld."

Certainly, as noted above, it may not be said that the interpretation accorded the 1972 Act by the Special Action Office as part of a "comprehensive, coordinated long-term Federal strategy" against drug abuse was either "irrational" or "unreasonable." The confidentiality provision of the 1972 Act applies to "drug abuse prevention functions" in general, while the absolute confidentiality provision of the 1970 Act applies to drug research programs, such as Dr. Newman's, where the success of the program depends upon the ability of the director to guarantee each patient that his participation will not be disclosed to anyone not connected with the program.

Our conclusion that the 1972 Act effected no repeal or modification of the 1970 provision is strengthened by the long-standing rule that, unless there is clear evidence of a legislative design to repeal or modify an earlier piece of legislation—and, assuredly, no such explicit design is here manifest—we must, if at all possible, give full effect to both statutes. (See, e.g., *People* v. *Mann*, 31 N Y 2d 253, 257-258; *Mtr. of Bd. of Educ. of City of N.Y.* v. *Allen*, 6 N Y 2d

127, 141-142; *Cimo* v. *State of New York*, 306 N.Y. 143, 148-149; *Trade Comm'n* v. *A.P.W. Paper Co.*, 328 U.S. 193, 202; *United States* v. *Borden Co.*, 308 U.S. 188, 198-199.)[7] "[I]t is familiar learning," the court stated in the *Allen* case (*Mtr. of Bd. of Educ. of City of N.Y.* v. *Allen*, 6 N Y 2d 127, 141-142, *supra*), "that repeals by implication are not favored by the courts. Generally speaking, a statute is not deemed to repeal an earlier one without express words of repeal, unless the two are in such conflict that both cannot be given effect. If by any fair construction, a reasonable field of operation can be found for two statutes, that construction should be adopted." Quite obviously, there are no express words of repeal in the 1972 Act, and it is equally clear that the two statutes are not in such conflict that both may not be given effect. Since, therefore, Dr. Newman may not be compelled to produce the photographs, he may not be held in contempt.

The order appealed from should be reversed, the adjudication of contempt vacated, and the motion to quash the subpoena granted.

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7. To support his contention that the 1972 Act effected a repeal of the provision authorizing absolute confidentiality to drug research programs by the 1970 Act, the respondent District Attorney points to statements of individual members of Congress made during its debate on the 1972 Act. Such reliance is misplaced. It has long been established that, since such statements tend to show the thinking of a few legislators rather than the intent of Congress as a whole, they "are not a safe guide, and may not be resorted to, in ascertaining the meaning and purpose of the law-making body." (*Duplex Co.* v. *Deering*, 254 U.S. 443, 474; see, e.g., *Zuber* v. *Allen*, 396 U.S. 168, 186; *United States* v. *Freight Association*, 166 U.S. 290, 318-319; Sutherland Statutes and Statutory Construction [3d ed.], §5011; see, also, with respect to New York Legislature, *Matter of Morse* [*Bank of America*], 247 N.Y. 290, 302-303; *Woollcott* v. *Shubert*, 217 N.Y. 212, 221.)

BREITEL, J. (dissenting):

Upon a showing that a witness to a homicide believed she had seen the killer, a fellow-patient, in the waiting room of a methadone clinic, the Appellate Division sustained a subpoena *duces tecum* to produce photographs of certain patients from the files of the clinic for the witness to view under carefully circumscribed conditions. The court order was authorized under a federal statute controlling the confidentiality of patient records which provides in part:

> "(b) (2) If the patient * * * does not give his written consent, the content of such record may be disclosed as follows:
>
> * * *
>
> (C) If authorized by an appropriate order of a court of competent jurisdiction after application showing good cause therefor. In assessing good cause the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services. Upon the granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure.
>
> (c) Except as authorized by a court order granted under subsection (b) (2) (C) of this section, no record referred to in subsection (a) of this section may be used to initiate or substantiate any criminal charges against a patient or to conduct any investigation of a patient."
>
> (U.S. Code, tit. 21, §1175)

Appendix A

The effect of the statute is to place on the court the sole power to disclose a patient's record after balancing the several interests involved. That is what it says. There are no qualifications. It does not give any primary or secondary role in the disclosure to the program officials or to supervisory administrators.

Ordinarily, one would look no further to legislative history because the meaning is patent. However, resort to the legislative history, even if some might regard such resort as unnecessary in the face of the statutory language, produces the same result.

This section is part of comprehensive federal legislation entitled The Drug Abuse Office and Treatment Act of 1972 controlling drug treatment and rehabilitation programs. If the proper interpretation of a statute is in doubt, reference may be made to changes and proposed changes of the bill during its passage to determine the legislative intent (*Woollcott* v. *Shubert*, 217 N.Y. 212, 221; McKinney's, Statutes, §125, esp. p. 258). A preliminary draft bill of this law, introduced in the Senate on June 18, 1971, contained no provision for the confidentiality of methadone patients' records (117 Cong. Rec. 20786-7). The bill was amended in committee providing that the records were to be confidential, and precluding their use by prosecutors (S. Rep. Nos. 92-486, 92-509). The House version of the bill had no confidentiality provision.

The law enacted was a compromise drafted by the House-Senate Conference Committee (Conf. Rep. No. 92-920). It included a confidentiality clause with the provision quoted above, incorporating an idea expressed by Senator

Hruska, allowing patients' records to be subpoenaed by court order (117 Cong. Rec. 20206).

The federal regulation relying on a 1970 statute would not have permitted the disclosure ordered in this instance. True, the regulation states that "Nothing in either the language or the legislative history of the [1972] Act indicates any intent on the part of Congress to amend the provisions of the 1970 Act or to reduce the protection which can be afforded under them," and this interpretation is entitled to considerable weight. But this interpretation is not controlling where Congress spelled out its intent to enact a new comprehensive scheme expressly permitting courts to order limited disclosure on good cause shown (McKinney's, Statutes, §129, subd. [b], *supra*).* The new scheme is designed to give maximum protection to "civil liberties" and to "the success of the treatment programs" without an "unnecessary restriction on possible prosecu-

* The McKinney's text states the rule as follows:

"Generally, a court should not hide behind the ruling of an administrative officer or agency and thus escape the duty to interpret the statute, since the court is the final arbiter as to the proper construction. In other words, a court should not blindly follow the rulings of administrative officers in construing statutes. Even though practical construction by an officer or agency charged with administration of a statute, especially when followed by a long period of time, is entitled to great weight and may not be ignored, such an interpretation is not necessarily binding on court.

If any act is not ambiguous, there is no room for the doctrine of practical construction, for the courts must effectuate the plainly expressed intention of the Legislature without regards to the opinion of public officers. * * *

In any event, doubtful meaning of a statute cannot be clarified or aided by practical construction of officers unless it first appears that such construction has been long established and continuous. * * *"

tions" (Senator Hruska, 117 Cong. Rec. 20206, *supra;* Representative Mikva, 118 Cong. Rec. 710).

In sum, given the plain language of the statute and the equally plain supporting legislative history, judicial control over the confidentiality of patients' records in the program is established. The recent post-enactment gloss on the legislative intention by the administrative officials is of no significance, especially when it is contradictory of the language of the statute. It was quite wise for the Legislature to leave the matter in the discretion of the courts, rather than with the director of the program, with the mandate to serve the policy of the legislation and yet protect innocents and the larger public policy of the State. Even if ambiguous language were involved, one should hesitate to ascribe a meaning to it which may very well mean in this case that a murderer should go free. I would make no such ascription because the language is quite clear, and I would not unless the language, the legislative history, or long continuous administrative construction compelled it.

Accordingly, the order of the Appellate Division should be affirmed.

• • •

Order reversed, without costs, the adjudication of contempt vacated and the motion to quash the subpoena granted. Opinion by Fuld, Ch. J. All concur except Breitel, J., who dissents and votes to affirm in an opinion in which Jasen and Gabrielli, JJ., concur.

Appendix B

Opinion and Order of the Appellate Division Entered October 31, 1972

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 31st day of October, 1972.

Present:

Hon. Harold A. Stevens, Justice Presiding
Owen McGivern
Arthur Markewich
Emilio Nunez
James B. M. McNally, Justices

m 10433

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

ROBERT NEWMAN, M. D.,
Appellant.

Order, Supreme Court, New York County, entered July 14, 1972, unanimously modified, on the law, to add to the subpoena duces tecum, subject of the motion to quash, the conditions hereinafter set forth, without costs: mandate, Supreme Court, New York County, entered July 25, 1972, unanimously modified, on the law and in the exercise of discretion, to provide that, within thirty days from entry

of the order to be settled hereon, defendant-appellant may be purged of the adjudication of contempt by complying with the said subpoena as so modified, without costs. Apparently motivated by the highest ethical canons of the medical profession in respect of confidential relations with a patient, defendant-appellant Assistant Commissioner of Health Services, responsible for direction of our city's methadone treatment program, has refused to obey a subpoena, as ordered by the court, which called upon him to produce certain photographs of patients so that a witness to a homicide might view them. The witness, said to be a patient in the drug program, has told investigating authorities that she believes the perpetrator of the crime to have been a fellow patient, and it is desired that she have the opportunity to endeavor to select his picture from amongst those of the patients. The program has Federal financing, and the applicable Federal statue controls. Absent consent by the unknown patient-suspect, "the content of * * * [his] * * * record may be disclosed * * * If authorized by an appropriate order of a court of competent jurisdiction granted after application showing good cause therefor. In assessing good cause the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services." (U. S. Code, tit. 21, §1175, subd. [b], par. [2], cl. [C]). Special Term has weighed these factors and, implicit in the order here reviewed, has determined that the public interest in apprehending a killer outweighs possible injury to a patient by his mere identification as such as well as any possible injury to the physician-patient relationship and to the treatment services. In ruling upon

the question, however, Special Term did not "impose appropriate safeguards against unnecessary disclosure" as required by the same section and subdivision of the United States Code. Appropriate safeguards have been consented to by the People, both in the papers under review and on argument, and we now impose them: that the witness view the photos under supervision of defendant Commissioner or someone designated by him, and that none of the pictures may be exhibited to police or prosecutor except that one which she may identify as the person sought; to that extent we modify the order appealed from. Since the safeguards were not in effect when appellant refused to obey the subpoena, we do now grant him the opportunity to be purged of contempt, as above set forth. With these safeguards, the Commissioner may now comply with the court's direction without fear of any breach of ethics. In concluding, we add that we find recourse to CPLR 4504 (subd. [a]) misplaced. Privilege against revelation of doctor-patient communication can be revoked only after the existence of the relationship has been determined. The only revelation sought is precisely that: identification of the patient as such.

Appendix C

Opinion and Order of the Supreme Court
Entered July 14, 1972

SUPREME COURT

NEW YORK COUNTY

TRIAL TERM—PART 30

In the matter of a
Subpoena Duces Tecum issued to SIDNEY BERTRAND for a grand jury investigation into the death of
TALMADGE BERRY.

The petitioner, Sidney Bertrand, moves for an order to quash the subpoena duces tecum issued to him by a grand jury of the County of New York.

The subpoena was issued to Dr. Bertrand as administrative director of Unit Number Two of the Francis Delafield Hospital Methadone Maintenance Treatment Program. This subpoena instructed him to bring with him photographs of all male Negro patients between the ages of 21 and 35 years who are in the Methadone Maintenance Treatment Program and to appear with such photographs before a grand jury of this county. In an affidavit to this Court, Sidney Bertrand stated that he did not have the power to comply with the subpoena and that he was not the proper party to be served with said subpoena.

Appendix C

In another affidavit submitted to this Court, Dr. Robert Newman stated that he, as the director of the New York City Methadone Maintenance Treatment Program, has the responsibility for determining what records can and cannot be shown under this program. Dr. Newman has been served by the district attorney's office with a similar subpoena and has been joined in this action.

The moving papers allege two arguments in support of the petitioner's demand to quash the subpoena.

The first argument is that the federal law controls the confidentiality of methadone records and prohibits disclosure of any patient-identifying information. To substantiate this argument, the petitioner points to the Public Health Service Act as amended by the Comprehensive Drug Abuse Prevention and Control Act of 1970, 42 U.S. Code §242a. This section authorizes the Secretary of Health, Education and Welfare to permit persons engaged in research on the use and effect of drugs to protect the privacy of individuals who are subjects of such research. The section further states that the person so authorized to protect the privacy of such individuals may not be compelled to identify any such individuals in any federal, state, or local civil, criminal, administrative, legislative, or other such proceedings. On April 6, 1972, the Commissioner of the Food and Drug Administration of the Department of Health, Education and Welfare published proposed regulations for all methadone maintenance programs that, in effect, provided for the protection as above set forth. The local methadone program is partially federally funded and might fall under this federal law.

Appendix C

The petitioner alleges only that the regulations as stated above have been proposed, but there is no showing that this, in fact, is the federal law. Therefore, this Court need not determine whether this law is applicable to the cause at bar.

The petitioner also asserts that section 4504, subdivision (a) of the Civil Practice Law and Rules makes the photographs requested privileged communication. The petitioner is mistaken. The privilege extends only to the information which would enable the physician to prescribe or act as a physician or surgeon. The photographs in question do not enable the petitioner to act in the capacity of a physician or a surgeon.

Therefore, the motion to quash the subpoena is denied. This constitutes the decision and order on the motion. The clerk of the court is directed to forward a copy of this decision and order, with notice of entry, to the attorney for the defendant.

Appendix D

Statutes and Regulations Involved

21 U.S.C. 872(c) provides in pertinent part:

Education and research programs of the Attorney General—Authorization

(a) The Attorney General is authorized to carry out educational and research programs directly related to enforcement of the laws under his jurisdiction concerning drugs * * * Such programs may include—

* * *

(3) studies or special projects designed to assess and detect accurately the presence in the human body of drugs or other substances which are or may be subject to control under this title, including the development of rapid field identification methods which would enable agents to detect microquantities of such drugs or other substances:

* * *

(c) The Attorney General may authorize persons engaged in research to withhold the names and other identifying characteristics of persons who are the subjects of such research. Persons who obtain this authorization may not be compelled in any Federal, State, or local civil, criminal, administrative, legislative, or other proceeding to identify the subjects of research for which such authorization was obtained.

42 U.S.C. 242(a) provides in pertinent part:

The Secretary [of Health, Education and Welfare] may authorize persons engaged in research on the use

and effect of drugs to protect the privacy of individuals who are the subject of such research by withholding from all persons not connected with the conduct of such research the names or other identifying characteristics of such individuals. Persons so authorized to protect the privacy of such individuals may not be compelled in any Federal, State or local civil, criminal, administrative, legislative or other proceedings to identify such individuals.

21 U.S.C. 1175(b)(2)(C) provides in pertinent part:

Confidentiality of Patient Records-Disclosure Authorization.

(a) Records of the identity * * * of any patient which are maintained in connection with the performance of any drug prevention function* authorized or assisted under any provision of this Act or any Act amended by this Act shall be confidential and may be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b) of this section.

Purpose and circumstances of disclosure affecting consenting or non-consenting patient

(b) (1) [consenting patients] * * *

(2) If the patient, with respect to whom any given record referred to in subsection (a) of this section is maintained, does not give his written consent, the content of such record may be disclosed as follows * * *

* "Drug prevention function" is defined in Section 1103(b), which states, "The term 'drug prevention function' means any program or activity relating to drug abuse, education, training, treatment, rehabilitation, or research, and includes any such function even when performed by an organization whose primary mission is in the field of drug traffic prevention functions, or is unrelated to drugs."

> (C) • • • If authorized by an appropriate order of a court of competent jurisdiction granted after application showing good cause therefore. In assessing good cause the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services. Upon granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure.

Prohibition against use of record in making criminal charges or investigation of patient

> (c) Except as authorized by a court order granted under subsection (b)(2)(C) of this section, no record referred to in subsection (a) of this section may be used to initiate charges against a patient or to conduct any investigation of a patient." 21 U.S.C. §1175.

Section 130.40(g) of the Department of Health, Education and Welfare Regulations on Confidentiality of Methadone Patient Records (37 C.F.R. 26800) provides in pertinent part:

> • • • in accordance with the authority conferred by • • • 42 U.S.C. 242(a) every program is hereby further authorized to protect the privacy of patients therein by withholding from all persons not employed by such program or otherwise connected with the conduct of its operations the names or other identifying characteristics of such patients under any circum-

stances under which such program has reasonable grounds to believe that such information may be used to conduct any criminal investigation or prosecution of a patient. Programs may not be compelled in any Federal, State, or local civil, criminal, administrative, or other proceedings to furnish such information, but this subparagraph does not authorize the withholding of information authorized to be furnished pursuant to §401.44 of this title nor does it invalidate any legal process to compel the furnishing of information in accordance with §401.44 of this title. Records relating to the receipt, storage, and distribution of narcotic medication shall also be subject to inspection as provided by Federal controlled substances laws; but use or disclosure of records identifying patients will, in any case, be limited to actions involving the program or its personnel.

Section 401.62 of the Special Action Office for Drug Abuse Prevention Interpretive Regulation on Confidentiality of Drug Abuse Patient Records (37 C.F.R. 24638-9), provides in relevant part:

> (a) It is abundantly clear that Section 408 [enacted as section 1175] (b)(2)(C) was not intended to confer jurisdiction on any court to compel disclosure of any information, but solely to authorize such disclosure. An order or provision of an order based on some other authority, or a subpoena, or other appropriate legal process, is required to compel disclosure. To illustrate, if a person who maintains records subject to section 408 [1175] (a) of the Act is merely requested, or is even served with a subpena, to disclose information contained therein which is a type whose disclosure is not authorized under section 408 [1175] of the Act or

any of the foregoing provisions of this part, he must refuse such a request unless, and until, an order is issued under section 408 [1175] (b)(2)(C). Such an order could authorize, but could not, of its own force, require disclosure. If there were no subpena or other compulsory process, the custodian of the records would have the discretion as to whether to disclose the information sought unless and until disclosure were ordered by means of appropriate legal process, the authority for which would have to be found in some source other than section 408 [1175] of the Act. This result is compelled by the language of section 408 [1175] (b)(2) itself. The words used, "the content of such record may be disclosed * * * if authorized by an appropriate order" are too explicit and too well established as words of art to be interpreted as meaning "the content of such record shall be disclosed if required by an appropriate order."

(b)(1) This interpretation of the permissible scope of a 408 [1175] (b)(2)(C) order is not only appropriate in the light of the purposes, language and legislative history of the Act in which it appears, but also is necessary in order to harmonize that section with other legislation dealing with a narrower aspect of the same subject matter. By sections 3(a) and 502(c) of the Comprehensive Drug Abuse Control and Treatment Act of 1970 (42 U.S.C. 242a(a); 21 U.S.C. 872 (c)), Congress conferred on the Secretary of Health, Education, and Welfare and on the Attorney General, respectively, power to authorize persons engaged in drug research to withhold names and other identifying characteristics of persons who are the subject of such research, and expressly provided that when such authority has been obtained, its holder may not be compelled to disclose identifying information "in any Fed-

eral, State, or local civil, criminal, administrative, legislative, or other proceedings * * *"

(2) If section 408 [1175] of the 1972 Act were to be interpreted as an independent grant of authority to compel testimony, it would obviously be in direct conflict with the provisions of the 1970 Act discussed above. This becomes significant, for example, in the case of methadone, which for the purpose of treating opiate addiction on a longer-range basis is classified as an experimental drug which may not be administered except in connection with research. Nothing in either the language or the legislative history of the Act indicates any intent on the part of Congress to amend the provisions of the 1970 Act or to reduce the protection which can be afforded under them. Since the language of section 408 [1175] permits, if it does not require, a construction which harmonizes with the 1970 Act, it clearly should not be construed to authorize a court order in derogation of any exercise of the authority of the Secretary of Health, Education, and Welfare under section 242a(3) of title 42, United States Code, or the Attorney General under section 872(c) of title 21, United States Code.